BAN HIN LEE CREDIT SDN. BHD.

v.

UTAMA COMPUTER CENTRE SDN. BHD. & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 23-155-87]
7 JANUARY 1981

LAND LAW: *Prohibitory order - Nature of - Renewal - Effective only on registration - Does not create interest in land - Temporarily inhibits dealings with land - Detailed requirements for seizure of land - Confirmed by Court - Sale of land - Attachment proceedings - National Land Code 1965, ss. 334-339 - Rules of the High Court 1980, O. 47 r. 6.*

CIVIL PROCEDURE: *Prohibitory order - Extensions - Insufficient affidavits - Failure to object - Whether functus officio - No special circumstances - Whether vitiates order for sale - Null and void - Inadvertent misstatement of facts - Ultra vires - Rules of the High Court 1980, O. 47 r. 6.*

On 21 March 1988, the plaintiff P (judgment creditor) obtained default judgment against the third defendant D3 (judgment debtor). On 5 September 1988, on application by P, the Senior Assistant Registrar (SAR) issued a prohibitory order under O. 47 r. 6(1) of the Rules of the High Court 1980 (RHC) directed at certain lands (the said lands), which was owned by D3. A writ of seizure and sale was issued on 28 December 1988; on 10 March 1989, P applied *ex-parte* to the SAR under O. 47 r. 6(5) of the RHC for an order extending the prohibitory order for a period of 6 months - this application was supported by an affidavit affirmed by P's Counsel (the said affidavit).

On 4 May 1989, an order for sale was made and a date fixed for sale by public auction; on 19 July 1989 a supplemental order was made for purposes of implementing the order for sale. On neither of these dates was there any request for further argument nor any appeal against the order.

On 12 September 1989, P obtained, *ex parte*, a second extension of the prohibitory order, based on an affidavit which was *in pari materia* with the said affidavit filed in relation to the first application for extension. On 9 March 1990, P obtained again *ex parte*, another extension of the prohibitory order and a similar affidavit was filed in support thereof.

On 13 April 1990, P applied for an order for the fixing of the date, time and venue of the auction while D3 applied on 5 June 1990 for setting aside of the prohibitory order on the ground that there had been no grounds shown for its extension. P's application was allowed and D3's was dismissed.

On 5 September 1990 P applied for a fourth extension, stating that the auction cannot take place on 5 September 1990 and that an application had been made to postpone the auction. D3's request for further argument in open Court was granted.

As a preliminary objection P contended that:

(a) it was too late now for D3 to attack the order for sale because he had earlier omitted to appeal against the same;

(b) that D3 had taken various steps in the proceedings with knowledge of the irregularities and so had waived the same.

The issues for the Court were:

(c) whether the orders extending the duration of the prohibitory order had been obtained upon insufficient affidavits and if so,

(d) whether the order for sale was in consequence fatally flawed.

Held:

[1] A Court, in its inherent jurisdiction, can set aside its own order; a person who is affected by the order can ask for it to be set aside; therefore, if the order for sale is a nullity, it is not a mere irregularity capable of being waived but an illegality.

(a) When an application for renewal of a prohibitory order is made, the jurisdiction given by the rule ought to be exercised with caution, because a prohibitory order is in the nature of a caveat, and so interferes with the rights of the owner of the land, against which it is registered from dealing with it;

(b) The existence of special circumstances, is a condition precedent to the exercise by the Court of its jurisdiction to renew a prohibitory order.

[2] The orders for extensions of the prohibitory order had been obtained on insufficient affidavits as:

(a) only one general ground was stated in the affidavits when seeking the first, second and third extensions, that is, that the solicitors were unable to take the necessary steps for the sale of lands within the 6 month period - however, it was not stated what precisely the reasons for the delay were;

(b) in the fourth extension, it was stated that the auction could not take place on 5 September 1990 - the deponent again did not state why the auction could not take place;

(c) on the facts and on the case law, there had not been shown to exist any reason to justify the exercise by the Court of its discretion to make any of the orders for extension of the prohibitory order.

[3] (a) A prohibitory order does not create an interest in land nor does it defeat an existing interest; it merely temporarily inhibits dealings with land or interest in land.

(b) The entry of a prohibitory order has the effect of attaching the land or interest therein which may then be sold in execution.

[4] Although in this case orders had been obtained for extension of the prohibitory order, the orders are void and of no effect as they have been obtained on insufficient affidavits; as such the orders vitiate the order for sale as it interrupts the continuity of the life of the prohibitory order.

[5] Sections 334-339 of the National Land Code and O. 47 r. 6 set out in detail the procedure for the seizure of land or an interest held by a judgment debtor.

[6] Until a prohibitory order is entered on the register document of title, it is not effective to authorise the seizure of the land or the interest therein for sale.

[7] The combined effect of the provisions in the RHC and the NLC lead to the inevitable conclusion that a sale of land in attachment proceedings must be carried out when a prohibitory order registered against it is in force.

[8] (a) An examination of the Court file shows that although the application for the prohibitory order was heard on 5 September 1989, it was granted by the SAR on 6 September 1989 - therefore, unless extended, it would have expired on 5 March 1989;

(b) however P had stated that it was due to expire on 12 March 1989 - as a result, the SAR made an order on 10 March 1989 - 4 days after the expiry of the prohibitory order extending it for a period of 6 months from 13 March 1989;

(c) therefore, the order granting the first extension was made by the SAR *ultra vires* the powers conferred upon her under O. 47 r. 6(5), of the RHC;

(d) As a result, the subsequent extension orders were all *ultra vires,* void and of no effect.

[All the orders for extension set aside; P's application for fixing of date, time and venue of auction dismissed.]

Cases referred to:
United Malayan Banking Corporation v. Syarikat Perumahan Luas Bhd. [1988] 2 CLJ (Rep) 522
Harkness v. Bel's Asbestos and Engineering Ltd. [1967] 2 QB 729
Eu Finance Bhd. v. Lim Yoke Foo [1982] 2 MLJ 37
Birmingham (Churchwardens and Overseers) v. Shaw [1849] 10 QB 868; 116 ER 329
In re Helsby [1894] 1 QB 742
In re Coles and Ravenshear [1907] 1 KB 1
Raman Chetty v. Muthiar Chetty [1922] 3 FMSLR 177
Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 116
S.A. Andavan v. Siow Meow Choi [1976] 1 MLJ 147

Legislation referred to:
Bankruptcy Rules [UK], r. 130
Courts of Judicature Act 1964, s. 68(2)
National Land Code 1965, ss. 334-339, 337(1)
Rules of the High Court 1980, O. 45 r. 12, O. 47 rr. 6(1), (4), (5) 7(a)

For the Plaintiff - Tan Phock Kin; M/s. Thillaimuthu & Tan Phock Kin
For the Defendants - Yeap Gim Guan; M/s. Yeap & Co.

JUDGMENT

Edgar Joseph Jr J:

Broadly stated, the dominant question of law which arises for decision in this case is whether a sale of land in attachment proceedings must be carried out when a prohibitory order, registered against it, is in force.

Specifically, the question for decision is whether an order for sale of lands, in attachment proceedings, can be successfully impugned, if it can be demonstrated to the satisfaction of the Court, that prior orders extending the duration of the relevant prohibitory order, registered against the lands, had been obtained upon insufficient affidavits.

For brevity and convenience, all references to sections in this judgment are, unless the context otherwise requires, to the National Land Code 1965 (the Code).

The history of the matter which calls for the consideration of the Court would seem to appear in the unchallenged affidavit evidence filed on behalf of the judgment creditor and can be shortly stated.

On 21 March 1988, the plaintiff (the judgment creditor) had obtained default judgment against

the third defendant (the judgment debtor) in the aggregate sum of RM258,765.39 together with interest thereon and costs under a guarantee particulars whereof are not material to the issues which now arise for decision.

On 5 September 1988, the judgment creditor caused to be issued, by the Senior Assistant Registrar, a prohibitory order under O. 47 r. 6(1) of the Rules of the High Court 1980 (RHC) directed at certain lands comprised in Lot Nos. 002344, 002354, 002356, 002357, 002358, 002359 and 002345 Section 2, Bandar Butterworth, Penang, held under Suratan Hakmilik Sementara No. HS(D) 797, 807, 809, 810, 811, 812 and 798 - seksyen 2, the properties of the judgment debtor (the lands) and duly registered at the land office on 13 September 1988.

On 28 December 1988, the judgment creditor caused to be issued a writ of seizure and sale.

On 10 March 1989 the judgment creditor applied, *ex parte*, to the Senior Assistant Registrar, on affidavit affirmed to by its Counsel, and obtained an order extending the duration of the prohibitory order for a period of six months, purportedly, in compliance with O. 47 r. 6(5) which provides:

> Upon the application of any judgment creditor on whose application a prohibitory order has been issued by the Court or a Judge, if it or he considers that special circumstances render an extension just, may from time to time by order extend the period of six months referred to in sub-rule (4), for any period not exceeding six months, provided that no order made under this rule shall have any force or effect unless it is presented for registration at the Land Office or Registry of Titles before the expiration of the prohibitory order which such order purports to extend;

With all due respect, the affidavit affirmed to by Counsel for the judgment creditor on 1 March 1989 filed in support of the application for extension of the prohibitory order contained precious little. Omitting formal and introductory matter, the only ground relied on appears in para. 3 thereof which reads:

> Since the prohibitory order has been granted we have taken the necessary steps for the sale of the said properties but have been unable to do so within the six months period.

The judgment creditor then caused a summons for an order for sale of the lands (encl. 6) to be issued and upon the hearing thereof, on 4 May 1989, Counsel for the judgment debtor raised an objection relying only on one ground. It was said that the judgment creditor had not taken out a writ of seizure and sale in form 88 prescribed by O. 45 r. 12 prior to the issue of the prohibitory order. This assertion was, of course, factually incorrect for the judgment creditor had in fact done so.

An order for sale was then made on the same day, that is to say, on 4 May 1989, and a date fixed for sale by public auction. There was no request for further argument and so no appeal was lodged against the order for sale.

On 19 July 1989, upon the application of the judgment creditor, and there being no objection by the judgment debtor, a supplemental order was made for purposes of implementing the order for sale. There was, perhaps, understandably, no request for further argument and so no appeal against the supplemental order.

On 12 September 1989, the judgment creditor applied, *ex parte*, to the Senior Assistant Registrar (encl. 46) on affidavit, affirmed to by its Counsel, and obtained a second extension of the prohibitory order. The affidavit (encl. 45) filed in support of the application was *in pari materia* with that filed in support of the first application for extension, the material portions of which have been hereinbefore reproduced.

On 9 March 1990, the judgment creditor once again applied, *ex parte,* (encl. 53), on affidavit, affirmed to by its Counsel (encl. 53), and obtained a third extension of the prohibitory order. The affidavit filed in support of this application was also *in pari materia* with that filed in support of the first and second application for extension of time.

Then, on 13 April 1990, the judgment creditor caused to be issued an application (encl. 57) for an order that the date, time and venue of the auction be fixed while the judgment debtor on 5 June 1990 caused to be issued an application (encl. 60) seeking to set aside the prohibitory order on the ground that there had been no grounds shown for its extension. After hearing Counsel on both sides on 19 July 1990, I had dismissed the judgment debtor's application whilst allowing that of the judgment creditor.

On 5 September 1990, the judgment creditor once again applied *ex parte* (encl. 69) on affidavit affirmed to by its Counsel (encl. 68), and obtained a fourth extension of the prohibitory order. Omitting formal and introductory matter the only ground relied upon appears in para. 3 and reads as follows:

> It is necessary to apply for an extension of the prohibitory order because the auction cannot take place on 5 September 1990 and an application has been filed to postpone the auction to another date. In view of this, I therefore pay for an order in terms of the application herein.

Thereafter, Counsel for the judgment debtor applied that the two applications (encls. 57 and 60) heard and decided in chambers on 19 July 1990 be adjourned into open Court for further argument and I granted that request.

I then heard Counsel on both sides at length and reserved judgment.

To recapitulate, the real points of law which arose for decision were twofold; namely, whether the orders extending the duration of the prohibitory order had been obtained upon insufficient affidavits and, if so, whether the order of sale was in consequence fatally flawed?

However, before I embark upon a consideration of them. I must, first of all, consider two preliminary objections raised by Counsel for the judgment creditor. Firstly, it was argued that it was too late now for the judgment debtor to attack the order for sale because he had omitted to appeal against the same, the time for doing so having long since expired and, secondly, that, in any event, the judgment debtor had taken various steps in the proceedings with knowledge of the irregularities and so had waived the same.

In *United Malayan Banking Corporation v. Syarikat Perumahan Luas Bhd.* [1988] 2 CLJ (Rep) 522, the defendant chargor although duly served, had not entered appearance, had not attended the hearing, had suffered an order for sale to be made against him in respect of the charged property, and had not appealed against it but had, after the appealable period had expired, taken out an application by way of summons-in-chambers to set it aside on the ground that it was a nullity. On the hearing of the summons-in-chambers, a preliminary point was taken by Counsel for the chargee that the Court was *functus officio* once the order for sale was perfected and so the chargor's remedy was by way of appeal which he could only have brought after complying with the formalities prescribed by s. 68(2) of the Courts of Judicature Act 1964. Apart from procedural grounds which are of no relevance to the present application, I dismissed the preliminary point on another ground which appears sufficiently from the following passage in my judgment at p. 524 col 2 F to H:

> In any event, it was argued that when, as here, the defendant was contending that the order of sale was a nullity, the Court could, in the exercise of its inherent jurisdiction, set aside its own order and an appeal was therefore unnecessary. In support of this latter proposition the

following passage in the judgment of Greene M.R. in *Craig v. Kanseen* [1943] 1 All ER 108, 113 was cited to me:

> Those cases appear to me to establish that on order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the Court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.'

In *Harkness v. Bel's Asbestos and Engineering Ltd.* [1967] 2 QB 729, 736, Lord Diplock stated the general rule at p. 736, thus:

> It has long been laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the Court and asking for it to be set aside.

This general rule was cited with approval by Abdoolcader J when speaking for the Federal Court in *Eu Finance Bhd. v. Lim Yoke Foo* [1982] 2 MLJ 37 at 39 and he added:

> Where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be attacked in collateral proceedings, before any Court or tribunal and whenever it is relied upon - in other words it is subject to collateral attack. In collateral proceedings the Court may declare an act that purports to bind to be non-existent.

And, in the next paragraph, he dealt with the failure to take advantage of the remedy of appeal where the impugned order is a nullity in the following words:

> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void. (*Birmingham (Churchwardens and Overseers) v. Shaw*) [1849] 10 QB 868, 880, 116 ER 329 (at p. 880 per Denman CJ).

In my opinion, if Counsel for the judgment debtor is correct in his submission then the order for sale would be nullity and so the remedy of appeal is not the only avenue of attack open to him. Similarly, if the order for sale is a nullity it is not a mere irregularity capable of being waived but an illegality.

To return to the two real points of law posed above, the result of my researches into the authorities compels me to conclude that the submission by Counsel for the judgment creditor that the orders for extension of the prohibitory order had been obtained on sufficient affidavits is quite untenable for reasons I shall presently state. When an application for renewal of a prohibitory order is made, the jurisdiction given by the rule ought to be exercised with caution, because a prohibitory order is in the nature of a caveat, and so interferes with the rights of the owner of the land, against which it is registered, from dealing with it. The Court can only make an order for renewal of a prohibitory order upon proof of the existence of 'special circumstances'. In other words, the existence of special circumstances, is a condition precedent to the exercise by the Court of its jurisdiction to renew a prohibitory order. The Court must thus be satisfied that there exist good reason or reasons before exercising its discretion to extend a prohibitory order. Extension is ordinarily not to be granted, as of course, on an application which is necessarily made *ex parte.*

In the present case, only one general ground is stated in each of the affidavits by Counsel for the judgment creditor when seeking the first, the second and the third extensions of the prohibitory order; namely, that the solicitors for the judgment creditor were unable to take the necessary steps for the sale of the lands within the six months period. However, the deponent had not condescended to state what precisely were the reasons for the delay.

Similarly, the fourth extension of the prohibitory order was obtained on the strength of an affidavit (encl. 68) which alleged only one general ground; namely, that it was necessary to apply for an extension because the auction could not take place on 5 September 1990. In this instance the deponent did not condescend to state what precisely were the reasons why the auction could not take place.

In *re Helsby* [1894] 1 QB 742 the Court was concerned with an application for extension of time under r. 130 of the Bankruptcy Rules 1886, which provided that:

> subject to the powers of the Court of Appeal to extend the time under special circumstances, no appeal to the Court of Appeal from any order of the Court shall be brought after the expiration of twenty-one days

Lord Halsbury LC said:

> The rule gives the Court power 'under special circumstances' to extend the time for appealing. Here there are, in my opinion, no special circumstances. A mistake was made by the clerk of the appellants' solicitors. If that is a 'special circumstance,' then in every case in which a blunder has been made about the time for appealing, the time ought to be extended. I do not think that is the meaning of the rule. The notice of appeal was served too late, and I can see no ground for extending the time.

And, this is what Davey LJ said:

> Upon the question whether the time ought to be extended, speaking for myself, I am inclined to adopt the view of the late James LJ, that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the rules, 'unless there has been on his part some conduct raising an equity against him' or in a case of 'inevitable accident.' I cannot see that a mistake made by the solicitor of the party who is applying for an extension of the time is a sufficient ground for extending it.

In re Coles and Ravenshear [1907] 1 KB 1 the Court was concerned with an application to extend time for appealing to the Court of Appeal under O. LVIII, r. 15 which provided that:

> no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days, and no other appeal shall, except by such leave, be brought after the expiration of three months.

The circumstances attending the delay were that Counsel while discussing the question of appealing after the decision of the Court below, within the precints of the Court, expressed an off-hand opinion that by the terms of the rule the appeal need not be brought within the fourteen days, which opinion thus given was confirmed by junior Counsel, and, on the strength of this opinion, the notice of appeal was not given till after the expiration of that period. It was held upon the authority of *In re Helsby* (*supra*), that there was no sufficient ground for granting special leave to appeal.

In the circumstances, I am satisfied there had not been shown to exist on the facts or the circumstances of the case any reason to justify the exercise by the Court of its discretion to make any of the orders for extension of the prohibitory order.

The next question is whether this flaw vitiates the order for sale.

First of all, it is pertinent to consider what a prohibitory order is and what is its effect?

By s. 334 of the Code, it is provided that a prohibitory order means

> where land or an interest in land held by a judgment creditor is to be sold in execution proceedings, an order made pursuant to rules of Court by Court of competent jurisdiction prohibiting the judgment debtor from effecting any dealing therewith effecting such dealing therewith as may be specified in the order.

It comes into full force and effect only upon entry in the Register Document of Title.

Like a private caveat, a prohibitory order does not create an interest in land nor does it defeat an existing interest but merely temporarily inhibits dealings with land or interest in land. (see *Raman Chetty v. Muthiar Chetty* [1922] 3 FMSLR 177). It follows, therefore, that the entry of a prohibitory order has the effect of attaching the land or interest therein which may then be sold in execution. (see s. 337).

Secondly, the detailed requirements to be observed for the seizure of land or an interest therein held by a judgment debtor should be noted; they are contained in O. 47 r. 6. These together with ss. 334-339 of the Code enable the judgment creditor to apply for a prohibitory order to be registered against the land or interest in the land held by a judgment debtor by entry in the Register Document of Title and then to proceed with execution by issue of a writ of seizure and sale to sell the same with a view to satisfying the judgment debt under O. 45 r. 1 and s. 337. It should be noted that seizure shall be by prohibitory order and no land or interest therein shall be deemed to have been seized until such prohibitory order shall have been registered under the Code. (see O. 47 r. 6(3)). The sale does not however become absolute until confirmation by the Court. (see s. 337(1)). In this context I would draw attention to *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116 at 121 where Gill FJ deals at length with the applicable procedure.

Going back a little, the life of a prohibitory order, unless extended by order of a Court or Judge, shall be 6 months from date thereof. (see O. 47 r. 6(4)). Extension of the prohibitory order, as already noted, may be for a period not exceeding six months, upon proof of special circumstances. (see O. 47 r. 6(5)). And, extension thereof, shall not have effect until a copy thereof is presented for registration before a prohibitory order lapses. (see s. 338(2)).

I would emphasise that until a prohibitory order is entered on the Register Document of Title, it is not effective to authorise the seizure of the land or the interest therein for sale. (see O. 47 r. 6(3)). So, for example, a sale of land which purports to have been effected by virtue of a prohibitory order can be set aside as irregular in the event of the prohibitory order not having been entered on the Register Document of Title. (see *S.A. Andavan v. Siow Meow Choi* [1976] 1 MLJ 147).

Similarly, if a judgment creditor fails to obtain an order of Court extending the life of a prohibitory order and it expires it will be ineffective to authorise the seizure of the land or the interest therein for sale.

Also noteworthy is O. 47 r. 7(a) which provides that there shall be no sale until the expiration of fourteen days from the date of registration of the prohibitory order.

The combined effect of the provisions in the Rules of the High Court and the Code to which I have referred compels me to the inevitable conclusion that a sale of land in attachment proceedings must be carried out when a prohibitory order registered against it is in force.

In the present case, orders had been obtained from time to time extending the life of the prohibitory order. However, for reasons I have stated, they were obtained upon insufficient affidavits which showed no special circumstances whatsoever justifying their grant. Those orders are therefore void and of no effect. I need hardly say that any of those orders if void would vitiate the order for sale since this would interrupt the continuity of the life of the prohibitory order. The position therefore is no different from a case where there has been no renewal of a prohibitory order. The orders for extension of the prohibitory order, the prohibitory order and the order for sale itself are therefore set aside with costs. In consequence, the judgment creditor's application that the date, time and venue of the auction be fixed is dismissed.

Stepping aside and taking a second hard look at the Court file, and, in particular, the contemporary minutes thereon in the personal handwriting of the Senior Assistant Registrar, I now note that there had been an active though inadvertent misstatement as to certain fundamental facts in the judgment creditor's application for the first extension of the prohibitory order which provide strong reinforcement for the conclusion at which I have arrived.

The application for the prohibitory order although heard on 5 September 1989 was in fact granted by the Senior Assistant Registrar not on that day but on the next day. This would mean that unless extended it would have expired on 5 March 1989.

Yet the judgment creditor had mistakenly stated in the same application that the prohibitory order was due to expire on 12 March 1989 and, in consequence, the Senior Assistant Registrar relying on that averment, made an order as late as 10 March 1989 - that is to say 4 days **after** expiry of the prohibitory order - purporting to extend the life of the prohibitory order for a period of 6 months with effect from 13 March 1989. The order purporting to grant the first extension was thus made by the Senior Assistant Registrar *ultra vires* the powers conferred upon her by O. 47 r. 6(5) since there is no power to resuscitate a dead prohibitory order. In consequence, the second and subsequent extension orders suffered from the same defect since they were all based upon the premise that the prohibitory order was due to expire on 12 March 1989 and were likewise void and of no effect.

The judgment creditor's remedy may perhaps lie in seeking a further prohibitory order provided it can satisfy the requirements of O. 47 r. 6(7) but that is a question which does not arise in these proceedings and upon which I express no concluded opinion.

Also found at [1991] 1 CLJ 711